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1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 -----x

5 UNITED STATES OF AMERICA,

6 v.

19 CR 374 (JMF)

7 MICHAEL AVENATTI,

8 Defendant.
9 -----x10
11 New York, N.Y.
12 January 11, 2021
13 2:45 p.m.

14 Before:

15 HON. JESSE M. FURMAN,

16 District Judge
1718 APPEARANCES
19

20 DAMIAN WILLIAMS

21 United States Attorney for the
22 Southern District of New York

23 BY: ROBERT SOBELMAN

24 MATTHEW D. PODOLSKY
25 ANDREW ROHRBACH

Assistant United States Attorneys

FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

BY: ROBERT M. BAUM

ANDREW J. DALACK
TAMARA L. GIWA

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1 (The Court and all parties appearing telephonically)

2 THE COURT: Good afternoon. This is Judge Furman.

3 Before I take appearances, couple quick reminders.

4 Please mute yourself when you're not speaking to avoid
5 background noise distraction. And when you wish to speak, make
6 sure you unmute yourself, and then make sure that the first
7 thing you say is your name so that the court reporter and I are
8 clear on who is speaking.

9 Reminder that this is a public conference, just as it
10 would be if we were in open court. We have a public line up
11 and running that has been merged with this line. I confirmed
12 that it is operational.

13 And, finally, a reminder that the conference may not
14 be recorded or rebroadcast by anyone.

15 With that, I'll take appearances beginning with
16 counsel for the government.

17 MR. PODOLSKY: Good afternoon, your Honor.

18 Matthew Podolsky, Robert Sobelman, and Andrew Rohrbach
19 for the government.

20 THE COURT: Good afternoon.

21 Counsel for Mr. Avenatti.

22 MR. BAUM: Good afternoon, your Honor.

23 This is Robert Baum on behalf of Mr. Avenatti. I'm
24 joined by my co-counsels, Tamara Giwa and Andrew Dalack.

25 THE COURT: Good afternoon to you as well.

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1 Can I confirm that Mr. Avenatti is on the line?

2 THE DEFENDANT: Yes, your Honor. Good afternoon.

3 THE COURT: Good afternoon. All right. I don't
4 actually think that Mr. Avenatti's consent is required for us
5 to proceed by telephone today, given the nature of the issues
6 that we will be discussing, but out of an abundance of caution,
7 I would be inclined to just confirm that he does consent.

8 Mr. Baum, any objection to that or any views on that
9 issue?

10 MR. BAUM: No objection, your Honor.

11 THE COURT: All right. Mr. Avenatti, as I'm sure you
12 know, you may have a right under Federal Rules of Criminal
13 Procedure to appear in person with counsel by your side in this
14 conference.

15 Do you consent to proceed by telephone today?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: At any point if you wish to consult with
18 your lawyers for any reason, let me know, and we will make
19 whatever arrangements we need to make for you to be able to
20 confer with them privately.

21 Understood?

22 THE DEFENDANT: Understood.

23 THE COURT: All right. Does counsel for the
24 government agree that we can proceed by telephone,
25 Mr. Podolsky?

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1 MR. PODOLSKY: Yes, your Honor, we do.

2 THE COURT: Mr. Baum, do you agree?

3 MR. BAUM: Yes, your Honor.

4 THE COURT: All right. Terrific. I agree as well.

5 We have a final pretrial conference scheduled in court
6 for next Tuesday, at which time I plan to deal with issues
7 relating to the trial itself, perhaps some outstanding
8 substantive issues.

9 The purpose of today's conference is primarily to
10 discuss the logistics surrounding the jury questionnaire that
11 will be administered on Thursday. Before we get to that,
12 however, let me briefly address the defendant's motion from
13 earlier today to access the jury selection records. That's ECF
14 number 223.

15 By text only order, I advised the government that it
16 should be prepared to address the issue at the conference. My
17 understand from the law cited in the defense brief is that the
18 defendant is basically entitled to the records he is seeking if
19 he wishes to have them, and I know that the government has
20 consented to that relief in other criminal cases.

21 I guess my question, Mr. Podolsky, is whether the
22 government opposes the relief being sought at this time?

23 MR. PODOLSKY: Thank you, your Honor. We do not
24 oppose the request for the information. I think it may be
25 helpful, just for a little bit of context on process here, if

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1 I may.

2 As the court is likely aware, these claims have been
3 made a number of times in the last two years, including
4 recently in the case United States v. Hossain, a case before
5 Judge Stein, which is 19 CR 606. I believe counsel for the
6 defendant was counsel, at least one of his attorneys was
7 counsel on that case as well.

8 The reason I raised this is for two reasons. The
9 first is, as I understand it, perhaps 80 percent or more of the
10 information sought by the defendant here was already provided
11 to the same attorneys in that case. I think we could speed up
12 matters if we enter an amended protective order for that
13 information to allow them to use it in this case.

14 That would, I believe, relieve the burden on the jury
15 administrator, as well I believe the delta. The outstanding
16 information would be information relating to jury summons and
17 questionnaires since that time, so I think since September of
18 2021.

19 As I say, we don't object to the defense getting that
20 information, but I do want to make a comment, which is that in
21 that case, and I believe uniformly in these cases, the courts
22 have denied these claims based on the third prong of the
23 inquiry which doesn't really relate to statistics. It is
24 whether there was a systemic exclusion of the group in the jury
25 selection process.

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1 I suggest that, perhaps, we could brief that issue
2 ahead of time, particularly because what happened in Hossain
3 was that defense counsel, I believe, filed the motion perhaps
4 the night before jury selection was supposed to start seeking
5 to stay jury selection.

6 I think it would be in everyone's interest to avoid a
7 scenario like that here, when we think the motion could be
8 resolved without this data, frankly, perhaps ahead of time.

9 THE COURT: OK. Mr. Baum, for starters, I will grant
10 the motion that was filed earlier today without objection.
11 That motion merely seeks the records, and my reading of the law
12 is that the defendant is entitled to it for the asking.
13 Whether there is a more efficient means of ensuring that the
14 defendant gets those records, I'll, frankly, leave to counsel.

15 I think you guys should discuss that offline, and if
16 there is an amended protective order that could be signed and
17 entered that would expedite that, great. Otherwise, the
18 defense will have an order and the jury department will provide
19 whatever records the order covers. So that much is done.

20 Mr. Baum, happy to hear from you in response to
21 Mr. Podolsky's remarks. What I would add to that, certainly in
22 any motion that you file, I think that you should be prepared
23 to address and you should address the timeliness of the motion
24 apropos what Mr. Podolsky said. My understanding is that
25 Federal Defenders have been regularly seeking these sorts of

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1 records and, indeed, has made various substantive motions based
2 on them in the past year or two. I suppose it raises the
3 question under subsection A of the statute whether that means
4 that the defendant here either discovered or could have
5 discovered by the exercise of due diligence the grounds for a
6 motion.

7 But I think, at a minimum, you need to address whether
8 any motion at this point would be untimely given the
9 possibility that this should have been raised earlier.

10 So, Mr. Baum?

11 MR. BAUM: Yes, Judge. Do you want us to address that
12 today or in writing?

13 THE COURT: Well, I was just raising that as, if you
14 were to make a substantive motion, you should certainly address
15 the timeliness of the motion. I don't think you should address
16 that today, because I'm not going to presume that you will file
17 a substantive motion. I'm just saying, if or when you do, I
18 guess the question I would like you to address today is, I
19 guess, two things.

20 One is Mr. Podolsky's suggestion that you have earlier
21 briefing on the non-statistical components of the test, and
22 second, perhaps alternatively or additionally, whether I should
23 set a deadline for any motion because, quite frankly, I'm not
24 going to be happy if next Wednesday evening I get a motion of
25 this sort when we're supposed to start voir dire on Thursday.

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1 MR. BAUM: Judge, also as to the timeliness --

2 THE COURT: Also, before I turn it over to you, I
3 think you should also be prepared to address whether the voir
4 dire examination begins within the meaning of the statute this
5 Thursday, when the questionnaire administrator next Thursday
6 when voir dire is conducted. I think there is a fair argument
7 to be made that the questionnaire is part of the voir dire
8 process, and in that sense, part of the voir dire examination.

9 But, again, you can address that if or when you file a
10 written motion. So the two issues that I flagged, if you can
11 address those.

12 MR. BAUM: Yes, Judge. We're happy to address those.
13 And yes, we understand about the timeliness issue on the jury
14 data. Also, we, to the extent that I interpret your comments
15 as the fact that the jury questionnaire extends to the voir
16 dire, it's part of the voir dire, we totally agree with that
17 conclusion, and we're going to raise that issue.

18 But I'm going to defer to my colleague, Mr. Dalack, to
19 respond to your questions.

20 THE COURT: All right. Mr. Dalack.

21 MR. DALACK: Hi, your Honor. This is Andrew Dalack.

22 So with respect to the court's first question about
23 Mr. Podolsky's suggestion that we sort of bifurcate the
24 briefing and address the third prong first, I just want to note
25 that our position is that it sort of puts the cart before the

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1 horse and could be interpreted as some sort of a waiver of our
2 unqualified right to the data.

3 So with the acknowledgment that your Honor just
4 granted our motion to obtain the data, I want to say that we
5 have no objection or problems working with the government to
6 streamline the process for collecting the data from the jury
7 administrator and will endeavor to minimize any sort of
8 reproduction of materials that are already in our possession.

9 I wish to note, Mr. Podolsky was referring to me. I
10 was counsel of record in Hossain and have also dealt with this
11 issue once before at trial before Judge Rakoff in United States
12 v. Nieves, 19 CR 354.

13 In that case, and in both 19 CR 354 and in Hossain,
14 explicitly in the Nieves case, and implicitly in Mr. Hossain's
15 case, the court rejected this idea of bifurcating the issues
16 because we take a different position with respect to the
17 significance of the third prong, and what our burden is to
18 show, discrimination or a violation of the fair cross-section
19 rights that Mr. Avenatti is entitled to.

20 So we would object to sort of briefing the issue
21 separately. It's all part and parcel to one fair cross-section
22 challenge. And, again, the legal arguments are sort of
23 well-trodden. At this point, but what isn't is the new data.
24 I just want to take a moment to explain and brief kind of the
25 complication here, which is that in my experience litigating

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1 these issues, it is difficult to anticipate when the jury
2 administrator is going to receive all of the data that is
3 responsive to the various COVID-related questionnaires that are
4 questions seminated by the jury administrator in summoning
5 prospective jurors to the courthouse.

6 I have encountered problems in the past with obtaining
7 up-to-date data because sometimes the responses come in right
8 up until, you know, the day before, two days before the jurors
9 arrive at the courthouse, and that presents difficulty.

10 So I think what I would sort of suggest to the court
11 is that you allow the parties to, in short order, propose to
12 the court an amended protective order governing the acquisition
13 of the jury selection data. We'll work with the jury
14 administrator rather quickly to figure out what is already in
15 our possession. I'll work with my expert statistician on that
16 point and what still needs to be collected.

17 I submit it is primarily the data of the jury
18 selection data for trials that have either been impaneled or
19 commenced between September of this year and the present,
20 postdating Mr. Hossain's trial in October, along with the
21 responses to the COVID questionnaires that were issued in
22 connection with this case.

23 So with that said, we would oppose, again, bifurcating
24 it because we think that that could be construed in the record
25 as some sort of a waiver of our right to inspect the data first

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1 before making any determination about whether we're going to
2 follow a motion. And, in fact, the case law that I cited to,
3 I think, is pretty clear that we need not even make any
4 representation about whether a motion challenging the fair
5 cross-section of the venire and is necessary for us to obtain
6 the data in the first instance, and that is sort of what the
7 government is alluding to here.

8 It would be essentially a tacit acknowledgment on our
9 point, on our behalf. We would agree to bifurcating the issue
10 that there is a way in which we can deal with the,
11 quote-unquote, merits of the fair cross-section challenge
12 before inspecting the data, and we don't think that that is
13 proper under the terms contemplated by the Jury Selection
14 Service Act or the Sixth Amendment strictures.

15 Then, forgive me, your Honor, if you could just repeat
16 your second question about was it with respect to setting a
17 schedule for any sort of briefing?

18 THE COURT: Yes. I'm reserving judgment on whether a
19 motion would have to be filed before this Thursday in order to
20 be timely under subsection A of the statute. But putting that
21 aside, I certainly want to avoid a situation where one has
22 filed, you know, on the eve of the beginning of jury selection.

23 So I'm open to your suggestions on that front, but
24 what I don't want is to arrive at the courthouse, planning to
25 conduct voir dire and find out that a motion was filed minutes

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1 before that I am expected to deal with before voir dire starts.

2 MR. DALACK: Understood, your Honor. I think that I
3 have two responses to that concern.

4 The first is that we are taking the position that the
5 written questionnaires are a part of voir dire. And I am
6 familiar, obviously, with the limitation within the Jury
7 Selection Service Act, that that states that we have seven days
8 within which to file a motion for a fair cross-section motion,
9 seven days from when we could have reasonably due diligence
10 discovered the basis for it.

11 I submit that, you know, notwithstanding the fact that
12 we litigated this issue previously, it is our position that
13 we're not in a position to assess the merits of any fair
14 cross-section motion until we get the data for this venire.

15 THE COURT: Can I interrupt for a second, Mr. Dalack?

16 MR. DALACK: Yes.

17 THE COURT: Maybe I'm misreading the statute.
18 Subsection A of Section 1867 says, in criminal cases, before
19 the voir dire examination begins or within seven days after the
20 defendant discovered or could have discovered by the exercise
21 of due diligence the grounds therefore, comma, whichever is
22 earlier, comma.

23 I read that to mean if the voir dire begins, again,
24 you're out of luck. Am I wrong about that? I don't think that
25 is a drop-dead deadline to make any such motion.

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1 MR. DALACK: I think under the terms, I'm not prepared
2 to completely agree with the court on that position. I think
3 that is a fair reading of the JSSA of 1867(a). However, I know
4 that there are different standards with respect to, we can make
5 arguments with respect to the different standards for the
6 timeliness of the motion on Sixth Amendment grounds versus JSSA
7 grounds.

8 I'm just not prepared on this particular call to agree
9 that if we filed a fair cross-section motion that also sought
10 to vindicate Mr. Avenatti's right under the Sixth Amendment,
11 as opposed to just the JSSA, that it would be untimely if it
12 happened to be filed after the voir dire commenced through the
13 written questionnaires.

14 That being said, I think that we're happy to work with
15 the government to obtain the records in short order as quickly
16 as possible, and then as I represented in the application, we
17 can get those over to our expert and get the analysis turned
18 around pretty quickly, and then we would be in a position to
19 take up any timeliness issues in the briefing.

20 As an alternative, too -- and I think that it is
21 incumbent upon me to make this argument for the sake of the
22 record at the risk of coming before the court for a third time
23 to ask for the same relief, I understand that that might
24 irritate the court -- so at the risk of irritating your Honor,
25 I would be derelict in my duties if I didn't ask for the

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1 opportunity for an adjournment of the proceedings in order to
2 see this through. So I'm making that application as well, part
3 and parcel to any concerns about timeliness.

4 But all of that said, I think we'll obviously do what
5 the court instructs. We'll obtain the data from the jury
6 administrator in short order, and if and when we file any fair
7 cross-section motion, assuming the court does not grant an
8 adjournment now, at this moment, then we'll take up timeliness
9 issues in the motion itself.

10 THE COURT: OK. That's a lot to unpack and respond to
11 in there, but I'm not sure you ultimately answered the
12 bottom-line question, whether any motion is timely at this
13 point.

14 Is there a drop-dead deadline by which you are
15 prepared to file any such motion, or you want to just leave it
16 open and address whether it's timely whenever you file it, if
17 you file it?

18 MR. DALACK: So, thank you, your Honor. I didn't mean
19 to avoid the ultimate question there. I could do one of two
20 ways. I suppose that it might make sense, assuming that the
21 court -- it doesn't sound like the court will consider any
22 adjournment on this basis -- would like to confer with the
23 government, get the amended protective order in place, confer
24 with the jury administrator, and then put in a letter motion
25 either on consent or not with respect to a drop-dead deadline

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1 for any motion, depending on when the jury administrator can
2 represent to us she can get the data over to us, which I'm
3 hoping to be in a day or two, given that the data that we need
4 that is sort of new is rather, I think, limited.

5 THE COURT: Number one, to the extent that the
6 deposition seeks adjournment on the basis of this motion, that
7 request is definitively denied. I'm not irritated by it, but
8 there is absolutely no basis for it.

9 I'll address COVID separately. The fact of the matter
10 is, I see zero reason this motion couldn't have been filed long
11 before today, and I'm a little bit flabbergasted that a few
12 days before jury selection is set to begin, that the request
13 for these records is being made.

14 The fact that the defendant waited until the tenth or
15 eleventh hour to make that request is absolutely not a basis
16 for adjournment of trial, and I'm not going to adjourn trial on
17 that basis.

18 Again, I'll address the COVID question separately and
19 later. I certainly think counsel should confer promptly to
20 figure out if there is a more efficient means by which the
21 defense can get the data that they seek, and then the defense
22 can work with the jury department to get whatever it is that --
23 whatever the delta is, whatever other data they don't have from
24 Hossain, whatever the case may be.

25 I also think it would make sense -- I'm sorry. Can I

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1 remind folks not speaking to place yourself on mute if you can,
2 just so there is no background noise distraction.

3 I also think that it's fine, I'm happy to leave it
4 open when any such motion would need to be filed, and let
5 counsel confer about that. And if there is agreement on a
6 drop-dead deadline, that would probably make sense, but I also
7 want to make clear that by setting that deadline, I'm not
8 suggesting that it renders any motion that would be untimely,
9 as of today timely, because it is being made by that deadline.

10 Frankly, I'm skeptical any motion would be timely at
11 this point. And to the extent it would be timely -- I'm sorry,
12 it would be untimely -- by setting a drop-dead deadline, I'm
13 not telling you that it becomes timely. I'm simply saying that
14 for case management purposes, it would be imprudent not to set
15 a drop-dead deadline for me to address it.

16 Finally, I guess I'm inclined not to bifurcate
17 briefing in part because I don't want to presume that the
18 defense will make a motion given this discussion. If they do
19 make a motion, I think there is an argument for all of it being
20 briefed together, so I can consider it all together and
21 consider the most efficient means to resolve it.

22 But I'm certainly open to hearing from Mr. Podolsky on
23 that. Mr. Podolsky, I don't know if there is anything in there
24 that you need to respond to, but I'll give you an opportunity
25 to be heard.

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1 MR. PODOLSKY: No, your Honor. Thank you.

2 Certainly, we will confer with defense counsel and try
3 to be efficient about getting the records. But other than
4 that, I have nothing to add.

5 THE COURT: All right. So we'll leave it there.

6 I'll grant the motion, as I said, and you guys should
7 confer immediately after this conference about the most
8 effective and efficient means to get the defense the data that
9 it is entitled to.

10 And, Mr. Dalack, I'll leave you to coordinate with the
11 jury department to get whatever it is that is not in your
12 possession through some other case.

13 MR. DALACK: Your Honor, if I may. This is Andrew
14 Dalack again.

15 On that point, with respect to the data itself, I just
16 want to understand the court's preferences. Assuming that
17 we're able to get the amended protective order over to the
18 court in short order and then have your Honor formally endorse
19 the letter motion that I filed, would it be the court's
20 preference for us to transmit that endorsed letter motion to
21 the jury administrator, or would the court prefer to on its
22 own?

23 I had it done two ways. Want to be clear on what the
24 court's preference is.

25 THE COURT: I would say both. I plan to advise the

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1 head of the jury department I granted the motion, but I will
2 leave it to you to contact them and make whatever arrangements
3 are needed for you to get whatever it is you need, in part
4 because I don't know what you have from the other case and what
5 you'll need to get from the jury department. I'll say both.

6 MR. DALACK: OK. Thank you, Judge.

7 THE COURT: All right. Other housekeeping matters.
8 Earlier today, I answered an order with respect to the three
9 motions that were filed either today or yesterday, all under
10 seal, directing any opposition be filed by Thursday, 5:00 p.m.,
11 for avoidance of doubt, and no replies may be filed with
12 respect to those prior leave is granted. Otherwise, I assume
13 there is nothing to discuss there.

14 Unless either side has something to discuss with
15 respect to that or otherwise, I want to turn to the jury
16 questionnaire process.

17 Mr. Podolsky?

18 MR. PODOLSKY: Nothing further on that topic.

19 THE COURT: Mr. Baum, or whoever?

20 MR. BAUM: Nothing further, Judge.

21 THE COURT: All right. As you know, under the order
22 at ECF number 160, the jury questionnaires are to be
23 administered on Thursday. I docketed a draft of the
24 questionnaire that I propose to use earlier today, and any
25 objections or suggestions are due to 10:00 a.m. tomorrow.

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1 Per the same order, it's the government's
2 responsibility to make the necessary copies and deliver them to
3 the jury department, provided you have contact information and
4 instruction on that. My understanding is that the government
5 is to make 160 copies, single-sided and stapled, and we
6 provided information when it is to be delivered.

7 Mr. Podolsky, can we confirm we're on the same page
8 there?

9 MR. PODOLSKY: Yes, your Honor. I think we have been
10 in contact with your chambers on the logistics and understand.

11 THE COURT: All right. Great.

12 On Thursday morning, my plan is to address the jury
13 pool before they complete the questionnaires. Nothing
14 particularly exciting, just standard sort of commemorating
15 instructions. Each side is certainly welcome to attend in
16 whole or in part.

17 As far as I'm concerned, you're not required to
18 attend. I would think if one side is there, both sides should
19 be there. In any event, we need to know in advance so we can
20 make the necessary arrangements, particularly given the social
21 distancing protocols that are in place.

22 So I guess the question I have is whether you wish to
23 be present for any remarks or would waive your presence and
24 allow me to address the jury pool without anyone there. I will
25 have a court reporter, so it will be on record, obviously, and

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1 open to the public as well.

2 But let me check with you, Mr. Baum, first.

3 MR. BAUM: Yes, Judge. On behalf of Mr. Avenatti, we
4 intend and certainly wish to be present during your remarks and
5 the completion of the questionnaires.

6 THE COURT: All right. Mr. Podolsky, I assume, in
7 light of that, the government will have someone present as
8 well?

9 MR. PODOLSKY: Yes, your Honor.

10 THE COURT: All right. So we will be in touch with
11 both sides offline. I think what will make sense is to have a
12 sort of staging area where everybody is waiting until the
13 appointed hour. I think the jury department has some
14 preliminary orientation type things. The jurors, my
15 understanding is that I will be called to give my remarks at
16 approximately somewhere between 10:00 and 10:30.

17 So bottom line is, we'll communicate to you offline
18 where and when you should be so that, at the relevant hour, we
19 can all enter the jury assembly room for me to give my remarks.
20 We'll make sure that there is space for you to be there.

21 My plan is to leave after I complete my remarks and
22 allow the jurors to complete the questionnaire and turn them in
23 to the jury department. I suppose you're welcome to stay as
24 well, but I'm not quite sure whether you would want to sit
25 there for that duration. Again, might be helpful to know in

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1 advance.

2 Mr. Baum, any thoughts on whether you intend to stay
3 for the duration, or leave with me when I'm done with my
4 remarks?5 MR. BAUM: We intend to stay for the duration, your
6 Honor.

7 THE COURT: All right. Mr. Podolsky?

8 MR. PODOLSKY: Thank you, your Honor. I think given
9 that the defense counsel intends to stay, we would at least
10 like to have the sort of ability to remain, whether or not one
11 or more of us does, if that would be all right with the court.12 THE COURT: That's fine. I would encourage you guys
13 to talk to one another. I don't know if it's worth having
14 three lawyers on each side present for all of Thursday's
15 proceeding. It may make more sense for you to stand down on
16 both sides and have just one lawyer rather than all three.17 I'll leave it to you guys to decide. We'll be
18 prepared for both sides to be there in force, and if you choose
19 to subject yourself to the duration, so be it.20 When the jurors complete the questionnaires under
21 order 160, it's the government's responsibility to promptly
22 make electronic copies, scanned copies of the completed
23 questionnaires, for both sides and for me. I understand,
24 again, that we have provided information on that stage and how
25 you're to get the copies and so forth.

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1 Mr. Podolsky, you'll be on the same page there, too?

2 MR. PODOLSKY: Yes, your Honor. Thank you.

3 THE COURT: All right. Great.

4 Certainly, we would ask that you provide electronic
5 copies as expeditiously as you can, since the clock will be
6 ticking on at least the defense strikes to be done and both
7 sides. As soon as they are in everyone's hands, the better.

8 On that score, just a reminder that under the
9 scheduling order, both sides have until Monday at three p.m. to
10 file their strikes. Reminder that the government has to file
11 its joint letter or a letter with the juror numbers that both
12 sides agree should be excused for cause. All of those jurors
13 will be excused without any further inquiry or review by me.

14 But at that same date and time, each side is to file a
15 letter listing any jurors as to which they believe should be
16 struck for cause, but the other side doesn't, and a brief
17 explanation of why. Those letters should reference the juror
18 numbers, not the juror's names. Just the numbers. I will then
19 review the list of single-strike jurors and decide who to call
20 back for the oral voir dire, which, again, will begin on
21 January 20 at 9:30 in the morning.

22 Any questions about any of that, Mr. Podolsky?

23 MR. PODOLSKY: No. Thank you very much, your Honor.
24 I think we understand.

25 THE COURT: Mr. Baum?

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1 MR. BAUM: No, your Honor. No questions.

2 THE COURT: All right. As I said, oral voir dire will
3 pick up on the morning of the 20th at 9:30. I do have, as you
4 know, January 21 for the backup, if we're not done by the end
5 of the 20th. Given the nature and length of the questionnaire,
6 I'm sort of hoping that we will complete jury selection in that
7 first day of oral voir dire and won't need the second day.

8 I guess the only question I have for you, we can
9 certainly play that by ear, if that is the case, my inclination
10 would be to at least end on Friday and beginning the trial
11 proceedings Monday morning rather than start a trial on Friday.
12 I'm certainly open to doing otherwise if both sides wish to get
13 started promptly.

14 Mr. Podolsky?

15 MR. PODOLSKY: No, your Honor. I think your proposal
16 of starting Monday will help keep everything organized and on
17 track. We would agree with that.

18 THE COURT: Mr. Baum?

19 MR. BAUM: Yes, your Honor. We were hoping to start
20 on Monday as well.

21 THE COURT: All right. Great.

22 And then public access, I'm not planning to arrange
23 for an overflow courtroom for the jury questionnaire session.
24 We can't really imagine many members of the public want to come
25 watch people fill out a questionnaire. I certainly imagine

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1 that there may be a handful of journalists otherwise there.
2 But I'm guessing we can accommodate them even if it is just
3 standing room in the back.

4 I do plan to have an overflow courtroom for the oral
5 voir dire on January 20, and if need be on January 21, and will
6 provide for one or more overflow courtrooms during the trial
7 proceedings themselves.

8 Number one, any objection to that?

9 Number two, does either side have any sense of sort of
10 the needs on that front, at least with respect to openings?

11 Should I plan on having multiple overflow courtrooms?
12 Would one suffice?

13 What are your thoughts, mindful of course of the
14 social distancing rules that are in effect, Mr. Podolsky?

15 MR. PODOLSKY: Well, as to the first question, no
16 objection to the plan you've outlined.

17 As far as the number of overflow courtrooms, candidly,
18 your Honor, I'm really not sure. I would hope that one is
19 enough, but I think, at this moment, it's a little hard for me
20 to predict how many folks from, for example, the U.S.
21 Attorney's office and public will hope to attend. Apologies
22 for not providing more assistance in that front.

23 THE COURT: Mr. Baum, any guess on your end?

24 MR. BAUM: Judge, regarding the size, I think it
25 depends on the size of the overflow courtroom. If it's not one

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1 of the large courtrooms, I think you may need two to ensure
2 proper spacing. I can assure the court that once witnesses
3 start coming in, I think we will need to, on particular days
4 and more than others.

5 THE COURT: Tell you what. I'll have two for the
6 openings.

7 I would like you guys to be attentive to this and let
8 my staff know if you anticipate we will need more than that,
9 with respect to any witness or witness days, you think there
10 will be particular interest, the more heads-up you can give us
11 the better. You know better than I what the schedule will be,
12 who the witnesses are, what interest in them may be, so on and
13 so forth. The more heads-up on that the better.

14 I will certainly ensure there is meaningful public
15 access, recognizing even in the best of times, nobody is
16 entitled to get into a courtroom. There is limited capacity.
17 The same is true today, even if it's a function of social
18 distancing as well.

19 I should note on this score that I do plan to provide
20 a press room for the in-house press. So to the extent that any
21 folks are listening in who might have an interest in that, they
22 should be aware of that. That will also alleviate the need.

23 Bottom line is, I'll have two overflow courtrooms for
24 the openings, and we'll play it by ear for the witnesses. To
25 the extent that the parties anticipate any particular or

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1 greater needs, you should let us know as early as possible so
2 that we can make appropriate arrangements.

3 All right. Final pretrial conference is next Tuesday,
4 now at 11:15 in the morning. My deputy will correct me by
5 direct message if I'm wrong about this. It will be in
6 courtroom 318 in the Thurgood Marshall courthouse, which I
7 think is the courtroom that we will be trying the case in, but
8 I will certainly confirm that next week to make sure everyone
9 knows where we're going. But, again, next Tuesday, 11:15 a.m.,
10 courtroom 318.

11 Finally, before I ask if you have anything else to
12 address, let me just briefly mention and address the COVID
13 situation and adjournment on that ground, since I said that I
14 would have something separate to say there.

15 The defense has obviously now twice made a request to
16 adjourn on the basis of, in part, the COVID situation and the
17 Omicron surge. As I noted in my orders, I'm closely monitoring
18 the situation and I certainly am prepared to revisit it, in the
19 event that there is reason to do so, that being either a
20 concern that we couldn't try the case safely, that trying the
21 case couldn't be done consistent with the need to provide a
22 fair trial, or frankly, that it would just be a waste of
23 everybody's resources because the odds of a mistrial are just
24 too high.

25 Right now, I am not convinced that any of those

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1 circumstances are present. One of my colleagues picked a jury
2 last week and is on trial now and another picked a trial on
3 Monday. I believe another is picking a jury tomorrow. I am
4 monitoring their progress and any pitfalls they have. They are
5 certainly in a more challenging situation than one would like.
6 But, in my view, it is absolutely critical for the public's
7 interest, for the defendant's interest, for the government's
8 interest to keep the system going as much as we can. And I
9 think the protocols that the court has in place have, to date,
10 been quite effective in ensuring that there is no spread within
11 the court.

12 So in that sense, I think the most material question
13 is just whether we can get the trial in without losing an
14 indispensable part of the parties. I do plan to have more than
15 the average number of alternate jurors just to ensure that we
16 have a sufficient number by the time we reach deliberations.

17 I would ask all of the parties and counsel to do their
18 best to take care, between now and when the trial is scheduled
19 to start, be careful not to expose yourself to more risk than
20 you need to. The bottom line is that, right now, I am
21 persuaded that we can proceed and that, while there is
22 certainly risks, that the risks are not sufficiently high to
23 throw in the towel just yet.

24 As I said, I'm closely monitoring the situation, and
25 if things change, I am fully prepared to revisit it, even if it

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1 is at the last minute. My hope is that we can and will
2 proceed.

3 Now, anything else from either side, Mr. Podolsky?

4 MR. PODOLSKY: No, your Honor. Nothing for the
5 government.

6 THE COURT: Mr. Baum?

7 MR. BAUM: Judge, just briefly on your last comments.
8 The court was not aware of this. I think it is just something
9 for the court to consider in the upcoming days before the trial
10 and certainly related to selection of the jury.

11 In the Eastern District of New York, the Chief Judge
12 adjourned a case of a bailed defendant after testimony by an
13 expert who is an epidemiologist about the dangers inherent to
14 conducting a trial at this time. It turns out that the
15 epidemiologist who testified with Judge Brody, certainly
16 listened to and took their advice, his advice, is the same
17 epidemiologist that has been consulted in the Southern District
18 of New York. I just wanted to bring that to the court's
19 attention.

20 THE COURT: I think you had cited Judge Brody's
21 adjournment in your most recent request for adjournment. I
22 don't think it mentioned the expert. I don't know if you're
23 referring to the expert that our court has been consulting in
24 connection with the protocols that are in place, but I will
25 certainly look into that.

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1 Bottom line is, my impression from consulting the
2 court personnel is that the person we have been consulting with
3 believes that we do not need to call a halt to jury trials and
4 we can proceed safely. In that regard, I would note that I
5 think the protocols in place in the Southern District are
6 different from those in the Eastern District. So it is
7 perfectly reasonable to draw a different conclusion in a
8 different district.

9 I appreciate your bringing it to my attention. It
10 doesn't change my view of where things stand today. It doesn't
11 shape my view. If things change and I come to a different
12 conclusion between now and the beginning of trial, we will
13 revisit it, but I hope that doesn't happen.

14 All right. With that, everybody stay safe and
15 healthy, not just because you should be safe and healthy. But,
16 again, I want to ensure that the trial goes off without a
17 hitch.

18 With that, we are adjourned. Thank you very much.

19 (Adjourned)